Filed 4/10/19 Jeffrey S. v. Kathryn W. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JEFFREY S.,

Plaintiff and Respondent,

v.

KATHRYN W.,

Defendant and Appellant.

A152599

(Humboldt County
Super. Ct. No. FL110101)

ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 8, 2019, be modified as follows:

The asterisk located next to J. Fujisaki's name is ordered to be removed.

There is no change in the judgment.

Dated: 04/10/19 Fujisaki, J. Acting P.J.

Filed 4/8/19 Jeffrey S. v. Kathryn W. CA1/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JEFFREY S., Plaintiff and Respondent, v. KATHRYN W., Defendant and Appellant.	A152599 (Humboldt County Super. Ct. No. FL110101)

This appeal arises from the request of appellant Kathryn W. (Mother) for modification of a custody and visitation order. Mother argues the trial court erred in ordering her to undergo hair and follicle drug testing because the trial court was not permitted to order this method of testing under Family Code section 3041.5,[1] and there was no substantial evidence of habitual, frequent or continual illegal use of controlled substances. Mother further argues the trial court erred in denying her motion for reconsideration as untimely. We reverse, in part, as to the method of substance abuse testing ordered, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following summary of factual and procedural history is taken from the very limited record on appeal. Mother and Jeffrey S. (Father) have been involved in child custody proceedings since February 2011, when Father filed a petition to establish custody over their daughter, C.S. In April 2015, a stipulated custody and visitation and

[1] All further statutory references are to the Family Code unless otherwise stated.

order was entered pursuant to which the parties stipulated to 50/50 legal custody and visitation. However, Mother claims her visits with C.S. have decreased over the years, and Father has not increased her time with their daughter as promised.

In May 2017, Mother filed a request for modification of the custody and visitation order, seeking to establish a written visitation schedule. A hearing on Mother's request was held on August 30, 2017. The minutes of the hearing state, in pertinent part: "Joan Gallegos present with petitioner [Father]. Respondent [Mother] present. . . . [¶] Attorney Gallegos stated that petitioner was willing to undergo hair follicle testing and was willing to pay for mother to undergo testing. [¶] The Court made the following temporary orders: The parties are to undergo hair follicle testing within 48 hours. If the child communicates to the father that she wants to see the mother, the father is to facilitate visitation between the child and the mother. Neither party is to make disparaging comments about the other party. All other temporary orders not in conflict continue in effect. [¶] The parties were referred to mediation."

On September 5, 2017, the trial court filed its findings and order after hearing (the September 5 order). The matter was continued for further hearing on September 21, 2017, with mediation scheduled for September 6, 2017. The court also ordered as follows: "1. Neither party shall discuss these proceedings with the minor child. [¶] 2. Neither party shall make disparaging comments regarding the other parent in the presence of the child. [¶] 3. Each party shall submit to hair follicle drug testing at Drug Free USA in McKinleyville, California on or before Friday, September 1, 2017. Father shall pay the testing fees for both parties. The drug test results shall be provided to the Court, counsel and mediator. [¶] 4. If the minor child communicates to Father that she wishes to visit with Mother, Father shall facilitate the visit. [¶] 5. Father shall continue to facilitate the minor child's participation in reconnective counseling with Mother with Virginia Norling, LCSW." According to the proof of service, the order was served on Mother by mail on September 5, 2017.

Eight days later, on September 13, 2017, Mother filed a motion for reconsideration of the trial court's order requiring hair follicle drug testing. On September 21, 2017, the trial court denied the motion as untimely (the September 21st order). Mother appealed.[2]

DISCUSSION

On appeal, Mother raises three claims of error: (1) the trial court was not permitted to order her to undergo hair follicle drug testing because section 3041.5 only permits courts in custody and visitation proceedings to order drug testing that conforms with the procedures and standards established by the United States Department of Health and Human Services for drug testing of federal employees, and presently, the only testing that complies is urine testing; (2) the trial court failed to make a determination based on substantial evidence that there was a habitual, frequent or continual illegal use of controlled substances; and (3) the trial court erred in denying her motion for reconsideration as untimely because the motion was filed within 10 days after she was

---

[2] There are two issues regarding appealability that we address on our own initiative (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126), but ultimately resolve in favor of reaching the merits of this appeal. First, the notice of appeal indicates the appeal was from an order entered on "9/21/2017"—the date of the order denying Mother's reconsideration motion. An order denying a motion for reconsideration is not separately appealable but is reviewable only as part of an appeal from an appealable order that was the subject of the motion for reconsideration. (Code Civ. Proc., § 1008, subd. (g).) The notice of appeal does not mention the September 5 order, and Mother did not file a separate notice of appeal from that order. However, as statutory authority for the appeal, Mother checked the box for Code of Civil Procedure section 904.1, subdivision (a)(3)–(13), and the only provision applicable here is subdivision (a)(10) (authorizing appeal from order made appealable by Family Code), which is reasonably construed as pertaining to the September 5 order. Furthermore, in her Civil Case Information Statement, Mother identified the September 5 order as the order appealed from. Because it is reasonably clear Mother was trying to appeal from the September 5 and September 21 orders, and Father does not contend he was misled or prejudiced in any way by Mother's error, we liberally construe the notice of appeal to include the September 5 order. (*In re Joshua S.* (2007) 41 Cal.4th 261, 272.) Second, as for the appealability of the September 5 order, although several of the rulings therein were "temporary" in effect until the continued hearing, we conclude the portion of the September 5 order requiring Mother to undergo hair follicle drug testing by September 1, 2017, was an appealable order after final judgment. (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377.)

served with the challenged order, as prescribed by Code of Civil Procedure section 1008, subdivision (a).

A. Standard of Review

We review questions of law on undisputed facts de novo. (*Deborah M. v. Superior Court* (2005) 128 Cal.App.4th 1181, 1187 (*Deborah M.*).) We review the trial court's rulings on custody and visitation for abuse of discretion (*Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150, 1162–1163) and we apply the substantial evidence standard to the trial court's factual findings that underlie the questioned exercise of discretion (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497).

B. Applicable Law

Section 3041.5 states that a court "may order any person who is seeking custody of, or visitation with, a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use of alcohol if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship." The court "shall order the least intrusive method of testing for the illegal use of controlled substances or the habitual or continual abuse of alcohol," and the testing "shall be performed in conformance with procedures and standards established by the United States Department of Health and Human Services for drug testing of federal employees." (§ 3041.5.)

In *Deborah M.*, the appellate court held the trial court erred in ordering a mother to submit to hair follicle testing because the federal standards at the time only allowed for urine tests. (*Deborah M.*, *supra*, 128 Cal.App.4th at pp. 1191–1194.) The *Deborah M.* court noted that section 3041.5 was enacted in response to the decision in *Wainwright v. Superior Court* (2000) 84 Cal.App.4th 262 (*Wainwright*), which recognized the constitutional concerns in court-compelled drug testing in child custody disputes. (*Deborah M.*, at p. 1189.) "Given the comprehensive nature of the Mandatory Guidelines [for Federal Workplace Drug Testing Programs] and their strict standards, the

requirement that the drug testing under section 3041.5 must comply with those standards is one of the most important ways in which the Legislature addressed the constitutional problems of court-ordered drug testing raised by the *Wainwright* court." (*Id*. at p. 1192.)

C. Order to Undergo Hair and Follicle Drug Testing

As a threshold matter, we note that Mother has elected to proceed without a reporter's transcript or settled statement of the August 30, 2017, hearing. "[W]here no reporter's transcript has been provided, and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported . . . testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

However, Mother's failure to furnish a reporter's transcript is not fatal to her appeal. The record clearly demonstrates the trial court ordered Mother to undergo hair follicle drug testing. The September 5 order mandates in no uncertain terms that "[e]ach party shall submit to hair follicle drug testing" by the given date. From our review of the federal authorities, it appears neither the guidelines in effect at the time of the September 5 order nor the guidelines currently in effect allow for hair follicle drug testing for federal employees.[3] No evidence or argument presented at the hearing could alter the fact that

---

[3] The applicable guidelines provide for urine testing and "authorized" alternate specimen types, but "[r]eferences to an alternate specimen are not applicable until final guidelines are implemented for the use of the alternative specimen matrix." (75 Fed. Reg. 22809–22810 (Apr. 30, 2010) [changing effective date to Oct. 1, 2010]; 82 Fed. Reg. 7920, 7925, 7946-7947 (Jan. 23, 2017) [guidelines effective Oct. 1, 2017].) Final guidelines have not yet been implemented. (80 Fed. Reg. 28054 (May 15, 2015) [notice of proposed revisions to mandatory guidelines regarding testing of oral fluid]; 80 Fed. Reg. 34921-01-34922 (June 18, 2015) & 80 Fed. Reg. 30689-02-30690 (May 29, 2015) [requests for information regarding hair specimen drug testing regarding potential use of hair specimens for drug testing]; 83 Fed. Reg. 8492 (February 27, 2018) [notice of closed session meeting of Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Prevention Drug Testing Advisory Board to discuss proposed

the trial court ultimately issued a formal order imposing a method of testing that did not conform to the procedures and standards for drug testing of federal employees. (§ 3041.5; *Deborah M.*, *supra*, 128 Cal.App.4th at pp. 1191–1194.) Section 3041.5 sets forth the procedures and standards that "shall" apply to court-ordered drug testing in custody and visitation cases, and the applicable law and regulations did not permit the method ordered here. Accordingly, this portion of the September 5 order must be reversed.

D. Determination of Habitual, Frequent or Continual Illegal Drug Use

Mother additionally contends that the trial court failed to make a determination based on substantial evidence of a habitual, frequent, or continual illegal use of drugs. Unlike the situation with Mother's first claim, the record on appeal for this contention is lacking and compels its rejection.

It is well settled that the appellant bears the burden to provide an adequate record on appeal. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 (*Ballard*).) "Failure to do so precludes an adequate review and results in affirmance of the trial court's determination." (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1.) Mother claims the trial court's decision to order drug testing was not supported by substantial evidence because neither she nor Father gave testimony at the August 30, 2017, hearing. But Mother's failure to provide a reporter's transcript of the hearing precludes any demonstration of error as to this evidentiary matter. (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.) We must presume that what occurred at the hearing would demonstrate the absence of error. (*Ibid.*)

Furthermore, we cannot say on this record that the trial court made its determination without any evidence whatsoever. The register of actions shows that in the days prior to the August 30, 2017, hearing, Father filed a "Responsive Declaration" and

---

mandatory guidelines for oral fluid and hair specimen testing]; 83 Fed. Reg. 58267 (November 19, 2018) [notice of open and closed sessions of Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Prevention's Drug Testing Advisory Board regarding proposed Mandatory Guidelines for Federal Workplace Drug Testing Programs with presentations on testing urine, oral fluid and hair.)

Mother filed a "Response: to Responsive Declaration." Thus, it appears there was evidence before the trial court at the time it ordered drug testing. Whether this evidence was sufficient under section 3041.5 to support the drug testing order cannot be determined because Mother did not include these declarations in the record on appeal. Thus, Mother has not satisfied her burden as the appellant to provide an adequate record for purposes of showing the trial court erred in ordering drug testing. (*Ballard*, *supra*, 41 Cal.3d at p. 574.)

E. Motion for Reconsideration

Finally, Mother asserts the September 21 order denying her motion for reconsideration was incorrect and requires reversal. The motion, however, was defective in that the record discloses Mother's supporting declaration failed to satisfy the requirements of Code of Civil Procedure section 1008, subdivision (a). Most notably, the declaration omitted to state what new or different facts, circumstances, or law not available at the time of the August 30, 2017, hearing would justify reconsideration of the September 5 order. (*Ibid*.) Thus, Mother is unable to show that her motion was erroneously denied.

DISPOSITION

For the reasons set forth above, we reverse, in part, the September 5, 2017, order to the extent it specified hair follicle testing as the ordered method of substance abuse testing, and remand for further proceedings consistent with this opinion. In all other respects, we affirm the September 5, 2017, order and the September 21, 2017, order denying Mother's motion for reconsideration.[4]

[4] Mother's request for expedited appeal, shortening of time, and calendar preference, filed on March 25, 2019, is denied as moot.

_____
Fujisaki, J.*

We concur:

_____
Petrou, Acting P.J.

_____
Wiseman, J.*

A152599

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.